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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

HARRY WEINSTEIN,

Petitioner,

vs.

THE STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF *CERTIORARI*

STATEMENT OF THE CASE

The petitioner, Harry Weinstein, seeks by writ of *certiorari* to have the United States Supreme Court review the decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Wake County imposing sentence upon the petitioner for larceny and for receiving stolen property knowing it to have been stolen. The opinion of the Supreme Court of North Carolina was filed November 22, 1944, and is reported as ***State v. Harry Weinstein***, 224 N.C. 645.

FACTS

The petitioner was charged with larceny of a quantity of waste paper of the value of three hundred twenty-five dollars, the property of the Raleigh Junior Chamber of Commerce, Inc. A second count in the bill of indictment charged him with receiving said property knowing it to have been stolen.

The State offered evidence tending to show that the Raleigh Junior Chamber of Commerce scheduled a scrap drive for Sunday, February 20, 1944, and that much publicity had been given this drive. The scrap paper was donated by the various citizens of Raleigh to the Raleigh Junior Chamber of Commerce and was to be gathered by the city trucks from the residences and business houses of the city. On the date scheduled for the particular drive in question, the weather was such as to make it advisable to postpone gathering the scrap paper until the next day.

An announcement to this effect was made over both radio stations in Raleigh and the collection of the scrap paper by the city trucks was actually begun at one o'clock on Monday, February 21, 1944. Prior to the time the decision was reached to postpone the collection of the scrap paper until the next day, various citizens of Raleigh had placed bundles of scrap paper in front of their houses and places of business so that the city trucks might pick it up without undue effort. The major portion of the scrap paper in certain sections of the city of Raleigh disappeared between the time it was placed in convenient locations on Sunday and the time it was supposed to be picked up by the city trucks on Monday.

While the scrap drive was being advertised in the newspapers, the petitioner Weinstein contacted the advertising manager of The Raleigh Times and undertook to buy the space under the ad advertising the scrap drive. The advertisement he desired to place below the scrap drive ad was to the effect that the citizens of Raleigh should not give away their scrap paper but should sell it to him. When the petitioner was informed that he would not be allowed to place his ad in the desired place, he went on a tirade and said

that the paper put out on the street belonged to anybody and that, drive or no drive, he was going to get his share of it. Trucks belonging to the petitioner were seen gathering paper in the sections of the city where the paper belonging to the Junior Chamber of Commerce disappeared. On Monday, February 21, between 9:15 and 9:30 a. m., the petitioner Weinstein was contacted and advised that his trucks had been picking up the paper belonging to the Junior Chamber of Commerce and, upon being advised not to unload one certain truck when it reached his place of business, he agreed that it would not be unloaded. Thereafter, several persons interested in the scrap drive went to see Mr. Weinstein and he was again informed that his trucks were out collecting Junior Chamber of Commerce paper and later when Weinstein was asked if any of the trucks had come in, he answered that one had come in. Upon being asked where the truck and paper was, he directed the inquirers to go to a certain place where they would find the paper that came in the truck. Upon reaching the point designated by Weinstein, nothing was found and it clearly appeared that Weinstein had purposely misdirected the persons who had made the inquiries. Weinstein was thereafter confronted with these facts and finally directed the representatives of the Junior Chamber of Commerce to where the paper was actually found in his possession. Various bundles of the paper were identified by the persons who had donated same to the Junior Chamber of Commerce. Some of the scrap paper had already been loaded in a railroad car preparatory to being shipped by the petitioner Weinstein.

The jury found the petitioner guilty, and this conviction was affirmed by the Supreme Court of North Carolina.

ARGUMENT

I

THE SUFFICIENCY OF THE EVIDENCE TO BE SUBMITTED TO THE JURY PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

When a state court judicially determines that there is sufficient evidence of a fact to be submitted to a jury, its decision is not reviewable by the United States Supreme Court on writ of *certiorari*.

Baldwin v. Kansas, 129 U.S. 52;
Noble v. Mitchell, 164 U.S. 367;
American Railway Exp. Co. v. Kentucky, 273 U.S. 269;
Bell Telephone Co. v. Pennsylvania Public Utility Commission, 309 U.S. 30.

In *Baldwin v. Kansas*, 129 U.S. 52, a capital case in which a writ of error was dismissed for want of jurisdiction, the court said:

> "The question whether the evidence in the case was sufficient to justify the verdict of the jury, and the question whether the Constitution of the State of Kansas was complied with or not in the proceedings on the trial which are challenged, are not federal questions which this court can review."

In *Noble v. Mitchell*, 164 U.S. 367, 373, Mr. Justice White says:

> "It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error. *Dower v. Richards*, 151 U.S. 659 (38:306); *Re Buchanan*, 158 U.S. 31 (39:884)."

II

THE SUPREME COURT IS WITHOUT JURISDICTION TO GRANT THE WRIT OF *CERTIORARI*, FOR THE PETI-

TIONER FAILED TO SET UP A CLAIM OF RIGHTS, PRIVILEGES, OR IMMUNITIES UNDER THE CONSTITUTION OF THE UNITED STATES IN THE STATE COURTS.

Although an attempt has been made to show that the question set out in the Petition for writ of *certiorari* is not a federal question or is not of sufficient substance and importance to justify the allowance of the writ, the State of North Carolina also contends that this Court is without jurisdiction to allow the petition, for the petitioner failed to set up this question *as a question arising under the Constitution of the United States* in the State courts.

Careful examination of the record will show that, although the petitioner took exceptions to alleged errors of law, he failed entirely to set up specially any rights, privileges, or immunities claimed under the Constitution of the United States in either the trial court or the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina treats the exceptions taken by the petitioner as raising questions of State law only. No federal questions are mentioned. The Petition for writ of *certiorari* filed in this Court omits any allegation that federal questions were set up as such in the State courts.

Under the statute authorizing review by *certiorari* of decisions of the highest courts of the several states, jurisdiction of the United States Supreme Court to review decisions alleged to involve rights, privileges, or immunities under the Constitution is limited to cases in which the rights, privileges, or immunities are "specially set up or claimed."

28 U.S.C. 1940 ed., Sec. 344

The rights, privileges, or immunities must be set up in the state courts.

Brooks v. Missouri, 124 U.S. 394;
Baldwin v. Kansas, 129 U.S. 52;
Hartford Life Ins. Co. v. Johnson, 249 U.S. 490.

CONCLUSION

The question set out in the petition is not a federal question, or, if it is, the question is not substantial and is not of sufficient importance to warrant consideration by the United States Supreme Court. The question was not set up in the State courts as a question arising under the Constitution of the United States. Therefore, the writ of *certiorari* should be denied.

Respectfully submitted,

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